

COMMENTS ON IGWA PROPOSED AGREEMENT FOR LONG-TERM CONJUNCTIVE MANAGEMENT FOR THE EASTERN SNAKE RIVER BASIN

Prepared by
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Introduction

Clear Springs Foods, Inc. has previously defined (June 24, 2004) key principles required in any agreement dealing with the Eastern Snake River Basin, including the Eastern Snake Plain Aquifer (ESPA). These are:

- State and Interim Committee re-affirmation of the protections afforded water right holders through the Prior-Appropriation Doctrine, State Law and the Idaho State Constitution. Implied in this requirement is that administration of water rights must be based on the Prior Appropriation Doctrine.
- State commitment to bring the ESPA and Snake River back into balance and bring certainty to the current and future economic fabric of water users and related interests (people) in the region. By balance Clear Springs firmly believes and hydrologic information submitted supports its position that discharges from the aquifer exceed recharge thereby negatively impacting aquifer levels, spring discharges and reach gains. This trend has resulted in senior rights being deprived of decreed water for many years.
- Immediate and meaningful action commencing March 2005 that begins to correct the imbalance.
- A plan that is supportable based on confirmed data and on the best science that forecasts goal achievement.
- Progress measured by results (indicator spring flow, groundwater levels and Snake River reach gains).

To the extent that the IGWA proposal (July 26, 2004) positively addresses these particular issues, we are supportive.

Given the fairly short timeframe in order to review the "Proposal" the following comments are preliminary in nature and may be supplemented in writing:

Comments on IGWA Proposal

Underlying Premises

Items A & B. We do not agree that the ESPA is particularly unique from a hydrologic perspective or that there are unique legal complexities that require a change in water rights administration. Other western states are actively dealing with supply shortages and drought conditions through conjunctive administration of water rights resulting in priority

curtailment actions. The Prior Appropriation Doctrine as embodied in the Idaho State Constitution and Idaho State Law should prevail.

Items C, D & E. We agree with the premise that the State of Idaho should assume the leadership role in developing and implementing a comprehensive water management program, that such a plan must address both the supply and demand of water from the ESPA, that changes to Idaho water law are not warranted.

Item F. We are uncertain what is meant by actions of private parties, the State of Idaho and the federal government. A major factor contributing to the problem includes the failure of the State of Idaho to appropriately administer water under The Priority Doctrine and the failure of junior appropriators to mitigate for their water use.

Item G. We agree, provided that water available is first delivered to the senior rights as provided under the Prior Appropriation Doctrine.

Item H. IGWA premises their proposal on the effect of long-term reductions in irrigation incidental recharge. They then propose to focus on long-term managed recharge. We acknowledge that reduced incidental recharge is one of several factors that has diminished ESPA water levels and hence spring flows. However, Idaho law clearly provides for water right holders to increase efficiency, not be allegedly responsible for an over-appropriation problem. The fact remains that 2 million acre-ft of water would be discharging from the aquifer if groundwater pumping were not occurring. Recharge is a tool that, when water is available, can be useful. The problem is that water in the ESPA and the Snake River is over-appropriated. Consistent supply of water for aquifer recharge sufficient to satisfy senior water rights throughout the basin is not currently available. Use of storage water for recharge or mitigation presumes that storage water will actually be available, the presumption of which remains highly questionable. Idaho has a diminishing supply of water in face of increases in demands.

Item I. We agree spaceholders' rights to water under USBOR contracts must not be impaired; nor should their priority to rental water pursuant to rental pool procedures.

Item J. IGWA suggests the ESPA is Idaho's largest reservoir and the most cost-effective "new" storage opportunity. The ESPA is a natural water supply tributary to the Snake River. Canal Company natural flow rights are dependent on the ESPA aquifer to satisfy its senior water rights. Historically, the State has not issued water rights conditioned on the ESPA as a storage facility and cannot now go back to do so. Rights which rely upon the aquifer either through direct withdrawal or as the water discharges must continue to receive water by strict priority.

Item K. We agree that historical peak spring discharges will unlikely be restored in the Thousand Springs and American Falls Reaches. We agree that these springs can be stabilized and increased through coordinated water management. We further believe the spring flows can be stabilized quickly (less than five years) and increased within a relatively short time thereafter. Stabilization and restoration must be achieved in order to provide certainty to existing and future development.

Item L. We do not agree that administrative curtailment of “junior” ground water pumping will have serious, widespread and long-term adverse economic impacts on Idaho’s economy that will not be offset by benefits of increased spring flows or river reach gains. Administrative curtailment of junior groundwater rights to fulfill senior surface and groundwater rights will have effects, both positive and negative on local economies. For example, surface water irrigation lands and senior groundwater irrigation lands, the acreage of which far exceed junior groundwater acreage, will substantially benefit from deliveries approaching decreed water rights. Additionally, other factions of local economies (aquaculture, municipalities, hydropower, recreation, tourism, future economic development opportunities and the environment) will also benefit.

Item M. We do not agree that it is Idaho Law or policy that spring-fed surface water users must take all reasonable steps to maximize collection, diversion and distribution of available water supplies or that they have not put this water to maximal beneficial use. Spring-fed surface water users with decreed rights have already demonstrated beneficial use in accordance with the elements of the rights. Nevertheless, it is incumbent on all water users, as good stewards of the State’s resources, to make reasonable efforts to maximize collection and distribution of water supplies.

Item N. We agree with the goal of stabilizing discharges within the Thousand Springs reach at 2004 levels within five years, but do not agree that stabilization is dependent on drought conditions. Stabilization can occur even if the drought continues. Drought conditions will simply require increased (greater) actions and commitments.

Item O. We agree that restoration goals need to be based upon objective technical studies, modeling and data, but do not agree that restoration goals be based on subjective economic considerations.

Items P, Q, and R. We agree that effective measurement, monitoring and reporting for all water users is essential to a successful management program. We agree that Idaho Power Company’s water rights should be honored in accordance with State law and as intended by the Swan Falls Agreement. We agree that Idaho Power Company could be a

beneficiary of large-scale, long-term aquifer recharge if such a program could be instituted without violating existing water rights and the prior appropriation doctrine.

IGWA Underlying Policies

We assume IGWA is referring to Idaho State policies. Without significant explanation of their understanding of these policies it is difficult to address each item in detail. We believe the hydrologic evidence indicates that the water resources of the ESPA have been over-developed and are not sustainable. There is no current opportunity to further develop this resource if sustainability with the satisfaction of senior water rights is to be honored as IGWA proposes. Further, recharge is a valuable tool for use when water is available. The goal of the State's water management program, which includes recharge, should be to satisfy all beneficial uses at all times, however, in times of shortage, senior needs must be met prior to junior water right needs.

IGWA Proposed Snake River Basin Cooperative Management Program

IGWA has attempted to make a constructive step with their proposal. Unfortunately, substantive change will be required if that step is to be truly constructive. Clear Springs Foods, Inc. is prepared to continue constructive deliberations over the water crisis confronting the ESPA region but emphasize that time for action is increasingly short. As identified in our introduction (above) there are certain principles that must be satisfied if an agreement is to be reached. Several items in the IGWA proposal deserve additional comment at this time.

- Funding for the stabilization and restoration actions must be the primary responsibility of the State and junior water right holders. All parties can assist in efforts to obtain federal and state funding.
- Attainment of goals must be based on objective standards relative to key target springs and observation wells, not reaches. Reaches do not necessarily correlate to water in the springs.
- Objective standards must be based upon yearly data, not multi-year averages.
- The measure of any program or actions taken will be the results attained, not simply the actions that were taken. If the actions taken do not result in successful results, additional curtailment or additional actions will be necessary. There is no safe harbor by simply taking actions.
- It is inequitable to insist that senior spring users curtail, set aside or take actions which the groundwater user would not otherwise take.

- To the extent possible, spring users will attempt to take action with one voice. However, that action may not always be possible. Clear Springs Foods, Inc. can not defer its fiduciary responsibilities to protect its assets to some other entity.
- Utilization of flow augmentation for recharge may necessitate consultation by federal agencies. The State of Idaho is aware of this fact and should take the lead in insuring that water users are not adversely impacted.

Executive Summary

While there are areas of commonality in the proposal when compared to the key principles required in order to bring consensus to a long-term agreement as presented by a number of spring users specifically detailed in the June 24, 2004 ESPA Working Group meeting, there remains a substantial part of the IGWA proposal that Clear Springs Foods, Inc. cannot support.

Areas of Commonality:

1. Protection of the Prior Appropriation Doctrine: We agree that the administrative principle of "first in time, is first in right", without qualification.
2. The State of Idaho has responsibility to water right holders to protect the integrity of the Prior Appropriation Doctrine and state law, and the protection of the resource (the aquifer, the spring flows and the river reaches) through administration for the benefit of the citizens of the State. Prior administrative actions of the State when reviewed with facts as understood today may not have protected these interests.
3. We agree the historical peaks of spring flows may not be attained again. However, no one should expect or demand the relinquishment of water rights.
4. Stabilization of spring discharges is the first step in the restoration of the aquifer, springs and reach gain.

Areas of Disagreement:

1. We do not agree that the ESPA is particularly unique from a hydrologic perspective or that there are unique legal complexities that require a change in water rights administration. The Prior Appropriation Doctrine as embodied in the Idaho State Constitution and Idaho State Law should prevail.
2. Managed recharge alone as identified by the IDWR study presented to the ESPA working group is not sufficient in numbers or reliability to accomplish restoration.

3. Idaho law and policy does not require the senior surface water right to take steps to maximize delivery, diversion, etc.
4. We do not agree that administrative curtailment of "junior" ground water pumping will have serious, widespread and long-term adverse economic impacts on Idaho's economy that will not be offset by benefits of increased spring flows or river reach gains. Administrative curtailment of junior groundwater rights to fulfill senior surface and groundwater rights will have effects, both positive and negative on local economies. For example, surface water irrigation lands and senior groundwater irrigation lands, the acreage of which far exceed junior groundwater acreage will substantially benefit from deliveries approaching decreed water rights. Additionally, other factions of the local economies (aquaculture, municipalities, hydropower, recreation, tourism, future economic development opportunities and the environment) will also benefit. More likely, appropriate management under the Prior Appropriation Doctrine will bring future certainty to water users and provide a foundation for future economic development for the State. Moreover, this management would result in the preservation of the natural beauty brought to the region by spring discharges.
5. Stabilization can occur even if the drought continues. Simply actions and greater commitments will be required.
6. Restoration goals need to be based upon objective technical studies, modeling and data, not on subjective economic considerations.
7. Funding of the stabilization and restoration actions must be the primary responsibility of the State and junior water right holders. All parties will assist in the efforts to obtain state and federal funding.
8. Objective standards must be based upon yearly data, not multi-year averages.
9. Use of storage water for recharge or mitigation presumes that storage water will actually be available, the presumption of which remains questionable.
10. The measure of any program or actions taken must be from results attained, not simply that actions were taken. If the actions taken do not result in successful results, additional curtailment or additional actions will be necessary.
11. It is inequitable to insist that senior spring users curtail, set aside or take actions which the junior groundwater user would not otherwise take.
12. To the extent possible, springs users will attempt to take action with one voice. However, that action may not always be possible. Clear Springs Foods, Inc. can not defer its fiduciary responsibilities to protect its assets to some other entity.

13. Utilization of flow augmentation for recharge may necessitate consultation by federal agencies. The State of Idaho is aware of this fact and should take the lead in insuring that water users are not adversely impacted.

Clear Springs Foods, Inc. remains committed to working with the State of Idaho and water users to consummate a long-term agreement that will bring certainty to its water rights into the future. We recognize much work will need to be done to reach an agreement. We will stand firm on insisting that our water rights be protected by the State and that we move in the direction as set forth in the key principles required as presented to the ESPA Working Group on June 24, 2004. We can not support any effort that weakens the Prior Appropriation Doctrine in any manner. Clear Springs Foods, Inc. believes that if a short and long-term water management plan is to be developed it will require a fundamental change in the ground water users plan.